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In The

Supreme Court of the United States

October Term, 1961

No. 451

A. RONALD PERKINS, Administrator of the Estate of SUE GARRETT PERKINS, Deceased,
Petitioner,

vs.

WAUKESHA NATIONAL BANK, Individually, and as Trustee, and EDWARD G. BACH, Individually, as Executor of the Estate of ISABEL HADCOCK, Deceased, and as Trustee under the Last Will and Testament of ISABEL HADCOCK, Deceased,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introduction

It would be difficult to find a case less worthy of the attention of this court than the one here presented.

The real question decided below is one of fact rather than law. The district court so dealt with the case in stating:

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"The claim for relief herein is based on the manner in which this fund was invested at the time it was segregated on June 25, 1940."

The Circuit Court of Appeals affirmed the following findings of the District Court:

"13. That it was the intention of the Trustee in reinvesting in the $50,000 secured note of Mrs. Isabel Hadcock on June 25, 1940, to comply with Chapter 320 of the Wisconsin Statutes, and it was the intention of Mrs. Isabel Hadcock to furnish the trustee with security, which was legal for the investment of trust funds under Chapter 320 of the Wisconsin Statutes.

"14. The reinvestment by the trustee in the $50,000 note secured by government bonds on May 15, 1943 and thereafter complied with the requirements of Chapter 320 of the Wisconsin Statutes.

"15. The reinvestments by the trustee were not made in bad faith.

"16. The reinvestments by the trustee were made with the approval and consent of Isabel Hadcock as required by the terms of the trust agreement.

"17. The trustee received no benefit either directly or indirectly from the reinvestments in question.

"18. The agency agreement between the bank and Mrs. Hadcock did not constitute a fraud against the plaintiff.

"19. The reinvestments by trustee exceeded the average yield on legal investments, and the plaintiff suffered no loss or damage as a result of the making of said reinvestments."

Petitioner does not contend in his brief that the findings are unsupported by the evidence. Without alluding to the evidence, he assumes the very fact in issue—*that trust assets which should have been placed in trust for the benefit of the original plaintiffs were exchanged for improper trust fund investments.* (Pet. p. 17)

There is not a scintilla of evidence in the record that any exchange of assets took place. The plain fact is that by the terms of the trust instrument any investment by the trustee could properly be made only after receiving Mrs. Hadcock's consent to such investment. (App. p. 62) The trial court found that she had never given her consent to an investment in Hein-Werner Corporation common stock. (App. p. 46)

Petitioner from the very outset has misconceived his rights in this litigation. The Supreme Court of Wisconsin, in construing the *inter-vivos* trust agreement in question, held that in the making of any new investment the trustee was bound to heed the legal trust fund investment statute. (See *First Wisconsin Trust Company v. Perkins* (1957), 275 Wis. 464, 82 N. W. 2d 331 and App. p. 46.) The Wisconsin Supreme Court did not hold that the trustee was obligated to retain the donor's original investments, i.e., Hein-Werner Corporation common stock, yet it is on this premise that petitioner has based the whole theory of this case.

The circuit court of appeals properly rejected the suggestion of counsel that the trustee was obligated to invest in Hein-Werner Corporation common stock. The circuit court of appeals stated:

"The Trustee Bank was not given unlimited discretion to select assets to fund the $50,000 trust. It was bound by Mrs. Hadcock's right of veto on its selection. Appellant contends that the Trustee Bank failed to exercise any discretion and merely followed the dictates of Mrs. Hadcock. However, in accepting Mrs. Hadcock's suggestion, the Trustee Bank did take action, and in taking such action did exercise its discretion.

"In oral argument appellant's counsel indicated that the Trustee Bank might have compelled Mrs. Hadcock's consent to the selection of the Hein-Werner stock, if the Trustee had chosen to fund the Trust with that stock; by withholding performance of the Trustee's other duties under the Samper Perkins Trust with respect to turning over to Mrs. Hadcock her share of the assets of the Trust. Such extortion of Mrs. Hadcock's consent would have done violence to the Settlor's clear intent."

Appendix A to Pet., p. xi

The plain fact is that the trustee made a new investment in Mrs. Hadcock's promissory note secured by legals or at least so intended. (App. p. 47) Hence, under the Wisconsin Supreme Court decisions the beneficiaries of this trust became entitled to a return on a legal trust fund investment. Everyone has agreed that such an investment has never exceeded five per cent. The district court on competent evidence found:

"The trustee made what it believed was a legal investment, and *it is undisputed that the investment so made exceeded the average yield on legal investments.*"

App. pp. 41-2

It is undisputed that there has never been any depreciation of the trust principal, nor have the beneficiaries

suffered a penny's loss of income from the actual investments made by the trustee.

We have found no case nor has petitioner throughout these proceedings cited us to one holding that a trustee of a legal trust fund investment is guilty of fraud who invests in assets which yield more than legals and who pays all of the income so received to the life income beneficiaries.

Conversely, there are several Wisconsin cases which hold that the mere fact that a trustee fails to invest in securities which qualify under the legal trust investment statute does not render the trustee liable in the absence of proof that the beneficiaries sustained some loss.

Guardianship of Farness, 225 Wis. 383, 273 N. W. 522;

Estate of George, 225 Wis. 251, 270 N. W. 538;

U. S. Fidelity & G. Co. v. Pullen, 230 Wis. 137, 283 N. W. 462.

See also *Restatement of the Law of Trusts*, Secs. 209-210, pp. 575-577.

In this case the beneficiaries have sustained no loss, either of income or of principal. They attempt to leave the impression in the petition to this Court that the district court found that the Isabel Hadcock note was never secured by legal trust fund investments. (Pet. p. 7) The district court never passed upon the question. (App. p. 39) Whether or not it was so invested became immaterial in the absence of a showing of loss or damage to the beneficiaries of the trust.

It comes as no surprise that petitioner should make extravagant claims in this litigation much the same as was done by these same beneficiaries in an earlier case. (See *Perkins v. Bach*, 350 U. S. 918, 78 S. Ct. 206, 233 F. 2d 251.) But in so doing, petitioner should bear in mind that if the donor intended that these beneficiaries should have the benefit of the yield on Hein-Werner Corporation common stock or on any other specific investment, it was for him to so state in the trust agreement. This the donor did not do.

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The Trustee Was Bound to Respect the Wishes of Isabel Hadcock in Setting Up the $50,000 Trust.

The Trust Agreement provided in part as follows:

> "10. In making distributions of the Principal of said trust estate, or setting aside any portion of such trust estate as hereinafter directed, the trustee may, in its discretion, appraise and distribute specifically any and all of the securities in which the trust estate shall be invested, or may sell or otherwise convert the same into money, or other securities, and may make such just and equitable distribution and division as in its discretion shall do justice between the parties; this power, however, to be exercised only with the approval and consent of my sister, Mrs. Belle Hadcock, during her lifetime."

If under the terms of the trust agreement a remainderman has power to control the action of the trustee in determining whether the trust should be set up by retaining assets of the settlor or by investing in legal investments, it

is well settled that the trustee is under a duty to act in accordance with the exercise of such power. See *Restatement of Trusts,* Vol. I, sec. 185, page 470.

No Wisconsin Supreme Court case is cited by petitioner that the foregoing is not a correct statement of the law of Wisconsin. No facts were proved at the trial which would require the court to find that Mrs. Hadcock was under a duty to select Hein-Werner Corporation common stock to fund the trust.

Moreover, if the trustee had wanted to set aside Hein-Werner Corporation common stock to fund the trust, Mrs. Hadcock had the power of veto over such selection. But petitioner's intestates have never requested the trustee to make such an investment; nor does the record show that such an investment was ever contemplated prior to the commencement of this action, either by the trustee, the beneficiaries or by Mrs. Hadcock.

No case has been made in the present record which could support a finding that Mrs. Hadcock was estopped from exercising her right of veto, or that she waived such right.

Petitioner's failure to mention in the petition the above quoted clause of the Trust Agreement suggests that it is not readily susceptible to attack.